

The fact that the Subdistrict Office in Fairmont may have had a less stringent enforcement policy for some period does not estop the Secretary from enforcing the Manual definition in these cases. Respondent has had a copy of the 1978 Manual for many years. It was put on notice by Inspector Phillips' discussion and subsequent citations in September, 1985, that the Manual definition would be enforced at Respondent's mine. The citations at issue in these cases were issued a month after such notice by Inspector Phillips.

The policy previously applied by the Fairmont Subdistrict Office was unauthorized and was contrary to national policy as shown by the Manual, which provides that "The guidelines in this chapter supersede all previous instructions as of February 1, 1978, relating to the same subject category." The situation was corrected by the District manager upon learning of the conflict. All Subdistrict supervisors and personnel have been brought into line with National Office policy.

In Secretary of Labor v. King Knob Coal Company, Inc., 3 FMSHRC 1417, 1422 (1981), the Commission stated:

. . . [An] estoppel defense would be inconsistent with the liability without fault structure of the 1977 Mine Act. See El Paso Rock Quarries, Inc., 3 FMSHRC 35, 38-39 (1981). Such a defense is really a claim that although a violation occurred, the operator was not to blame for it. Furthermore, under the 1977 Mine Act, an equitable consideration, such as the confusion engendered by conflicting MSHA pronouncements, can be appropriately weighed in determining the penalty....

Even in those cases where the courts have recognized an estoppel defense, it has been held that estoppel does not apply "if the government's misconduct [does not] threaten to work serious injustice and if the public's interest would...be unduly damaged by the imposition of estoppel." King Knob, 3 FMSHRC at 1422, quoting United States v. Lazy F.C. Ranch, 481 F.2d, 985, 989 (9th Cir. 1973). In view of the availability of penalty mitigation as an avenue of equitable relief, finding an operator liable would not work such a "profound and unconscionable injury" that estoppel should be invoked. King Knob, 3 FMSHRC at 1422.

In order to be considered a "significant and substantial" violation, it must be found that: